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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. KIMBERLY LOUISE LONG, Defendant and Respondent.	E066388 (Super.Ct.No. RIF113354) OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Michael A. Hestrin, District Attorney, Alan D. Tate, Senior Deputy District Attorney for Plaintiff and Appellant.

Michelle Rogers, under appointment by the Court of Appeal, for Defendant and Respondent.

In December 2005, a jury found defendant and appellant Kimberly Louise Long, guilty of second degree murder. (Pen. Code, § 187, subd. (a).)[1] The trial court sentenced defendant to prison for a term of 15 years to life. Defendant petitioned the California Supreme Court for a writ of habeas corpus based, in part, upon ineffective assistance of trial counsel and defendant's actual innocence. In 2015, the Supreme Court issued an order to show cause, before the trial court, as to why defendant's trial counsel was not ineffective and why defendant is not actually innocent of the murder. The trial court granted the writ of habeas corpus on the ground of ineffective assistance of trial counsel. The trial court found defendant failed to meet her burden of proving actual innocence.

The People contend the trial court erred by granting the writ. In particular, the People assert the trial court erred by finding defendant's trial counsel was ineffective for (1) failing to present a time of death defense; and (2) failing to provide further evidence that defendant was wearing the same clothes on October 5, 2003, that she was wearing when police arrived at her house on October 6. We reverse the order.

FACTUAL AND PROCEDURAL HISTORY

I. FIRST TRIAL

Defendant's first trial took place in February 2005. Defendant was represented by Eric Keen. The People were represented by Jerry Fineman. The jury was unable to

[1] All subsequent statutory references will be to the Penal Code unless otherwise indicated.

reach a verdict, and the trial court declared a mistrial. The jury was split by three jurors in favor of guilt, and nine jurors in favor of acquittal.

II. SECOND TRIAL

A. *BACKGROUND*

Defendant's retrial took place in December 2005. Defendant was again represented by Keen. The People were again represented by Fineman.

The victim, Oswaldo Conde, was 31 years old in 2003. The victim was defendant's boyfriend. They lived together in a house in Corona (the House). Defendant was an emergency room nurse.

B. *PROSECUTION'S CASE*

1. The House

The front door of the House opened into the living room. As one stepped into the House, one stepped into a type of hallway that was created by a wall to the right of the doorway, and the back of a loveseat to the left of the doorway. After walking the length of the loveseat, one could access the rest of the living room to the left. At a right angle to the loveseat, against the same wall that encompasses the front door, there was a couch. In other words, if one walked in the front door, and made a U-turn around the loveseat, one would be facing a couch. A coffee table was in front of the loveseat and couch. Three bats and a golf club were stored in the living room, near the front door.

2. Dills's Timeline of Events

In this subsection we present the timeline of events provided by Jeffrey Dills. Dills's preliminary hearing testimony was read at trial due to Dills dying prior to trial in a motorcycle accident.

On October 5, 2003, between 10:00 a.m. and 11:00 a.m., defendant, the victim, Dills, and other people met at a restaurant bar, the Chuck Wagon, for a motorcycle ride. Defendant drank alcohol while at the Chuck Wagon. The group was at the Chuck Wagon for approximately 90 minutes. At approximately noon, the group rode their motorcycles to Tom's Farms. Defendant drank alcohol while at Tom's Farms. The group stayed at Tom's Farms for "[a] couple hours." At approximately 2:00 p.m. the group rode their motorcycles to another bar, the Sportsman. More alcohol was consumed at the Sportsman. The female bartender, Tabitha, was an acquaintance of defendant's.

Dills left the Sportsman at approximately 4:30 p.m., arriving home at 5:00 p.m. Defendant and the victim remained at the Sportsman. Later that evening, defendant called Dills and asked him to come back to the Sportsman and give Tabitha a ride from the Sportsman to another bar, the Maverick. Dills declined, but agreed to meet at the House and give Tabitha a ride from there.

Dills went to the House. Defendant and Tabitha were not at the House, but the victim was there. The victim invited Dills inside. Defendant and Tabitha arrived at the House. Dills was in the House approximately 15 minutes while waiting for defendant and Tabitha to get ready. Defendant and Tabitha wore novelty hats that looked like beer

mugs. The group (Dills, Tabitha, defendant, and the victim) rode motorcycles to the Maverick, in Norco. Defendant rode with the victim. Tabitha rode with Dills. It was nearly dusk when the group left for the Maverick, and it was dark when they arrived at the Maverick.

Defendant appeared to be intoxicated; she was slurring her speech and unsteady on her feet. After "several hours" at the Maverick, defendant and the victim argued about the victim's accusation that defendant was overly flirtatious. At some point between 9:00 and 11:00 p.m., Dills decided to leave the bar. Defendant did not want to ride home on the victim's motorcycle because defendant believed the victim was intoxicated. Defendant became upset with Dills when Dills said defendant was intoxicated. Defendant rode to her home with Dills's friend, Bill Devlyn. Tabitha stayed at the bar.

Dills went to defendant's house, arriving between 10:00 and 11:00 p.m. Within five minutes, the victim, defendant, and Devlyn arrived at the House. The victim revved his motorcycle's engine while in the street, at the end of the driveway. The victim parked his motorcycle in the garage and then walked out to the driveway, leaving the garage door open. Defendant and the victim argued in the driveway. Defendant accused the victim of "not paying his share and being a loser and not having a job." Defendant struck the victim with her helmet, her purse, a hat, and then "threw all the stuff at him." The victim protected himself from the strikes.

Defendant struck the victim with her hand. The victim was angry, and he backed up as though he might strike defendant. At that point, Dills intervened in the fight,

stepping between defendant and the victim. Dills warned that a neighbor might call the police and defendant or the victim would be arrested. The victim went inside the House. Defendant decided to leave with Dills. The incident in the driveway lasted approximately 15 minutes. Defendant and Dills went to Dills's home, which was two and one-half to three miles away; the drive took approximately 10 minutes.

At Dills's house, defendant and Dills had a drink and sat in his hot tub. Defendant wore panties and one of Dills's shirts while using the hot tub. In the hot tub, defendant complained about the victim "not paying for his share, that she has to pay for everything. He wasn't doing enough." Defendant and Dills went to his bedroom. Dills orally copulated defendant. In the midst of the oral copulation, defendant announced that she needed to return home because her ex-husband had been scheduled to drop-off her child at her home. As defendant dressed, she said of the victim, " 'I'm so mad I could just kick his ass.' " While dressing, defendant did not put on her panties because they were wet from the Jacuzzi. Defendant was at Dills's house for "an hour and a half, two hours."

Dills drove defendant to the House on his motorcycle. Dills's motorcycle had exhaust pipes on it that some people might find loud. As a courtesy to the victim and the neighbors, Dills turned off his motorcycle when approaching the House and coasted to the driveway, so as to not wake people with the noise of his motorcycle. Defendant could not find her cell phone. Dills advised her that it might be in the bushes at the House because it may have fallen out when defendant threw her purse at the victim. Dills shined his motorcycle's headlight on the bushes to help defendant find her phone.

Defendant went into the House; it did not appear to Dills that she used a key to open the front door, i.e., the door was unlocked. It was approximately 1:20 a.m. when defendant entered the House. Dills started his motorcycle and rode home. Dills arrived home at approximately 1:30 a.m. Dills looked at the clock at 1:36 a.m., as he set his alarm before falling asleep.

3. Recollections of Neighbors

Phillip Virga, the neighbor across the street and one house over from the House, heard a motorcycle engine revving at 11:50 p.m. on October 5, 2003. Virga looked at the clock, which was next to the bed he was in when he heard the noise. Virga got out of bed, looked out the window, but could not see anything. Virga walked out onto his balcony. It sounded as though the noise was coming from inside the garage of defendant's house. The garage door was closed, and no lights were on. Virga heard a loud female voice. When the yelling stopped, Virga returned to bed. Approximately 20 minutes later, the motorcycle engine revving started again. Virga yelled from his balcony, "It's after midnight. Give us a break and let us get some sleep." When Virga was on the balcony, he did not see anyone across the street because there were no lights on across the street.

Virga went back to bed. Virga's sleep was interrupted again at 1:20 a.m. when he heard a loud motorcycle on the street, driving away from the House. Virga again looked at the clock next to his bed when he heard the noise. Virga was awoken at 2:00 a.m. when defendant's car alarm sounded.

Alejandro Sandoval, the neighbor next door to the House, heard someone trying to start a motorcycle inside defendant and the victim's garage around 12:30 a.m. Alejandro[2] said to his wife, " 'Here we go again,' " because on three or four prior occasions the victim had difficulty starting his motorcycle. The revving lasted 10 to 15 minutes. Alejandro heard the victim swearing. Alejandro assumed the victim was swearing to himself because the victim was angry about having difficulty starting the motorcycle. Alejandro did not hear any other voices. During a police interview on October 22, 2003, Alejandro said he did not hear any voices during the 12:30 a.m. engine revving. Alejandro heard the motorcycle leave at approximately 12:45 a.m. The police report did not reflect a statement from Alejandro that the motorcycle left. At 2:00 a.m., Alejandro heard a car alarm.

Alejandro's wife, Juanita Sandoval, heard the victim in his garage. The victim was swearing and trying to start a motorcycle at 1:30 a.m. Juanita did not hear anyone else in the garage. The motorcycle would start for a moment and then turn off. While Juanita was listening, the victim did not get the motorcycle running and he did not leave the property. The motorcycle engine revving lasted 10 to 15 minutes. At approximately 2:00 a.m., Juanita heard defendant's car alarm.

[2] We use Alejandro's first name for the sake of clarity because another witness also has the last name Sandoval.

4. Paramedics and Police

a) *911 Call*

At 2:09 a.m. defendant called 911. Defendant said to the dispatcher, "Oh my god something happened to my husband. [¶] . . . [¶] I just came home. He's bloody. I don't know what's going on. He's still breathing. Something's wrong." The following exchange occurred:

"[Defendant]: Something's wrong. I can't even help him.

"Dispatcher: Okay. Is he breathing? Can you check?

"[Defendant]: I don't know what's going on with him.

"Dispatcher: Okay.

"[Defendant]: I can't look at him.

"Dispatcher: Okay. You see him breathing though, right?

"[Defendant]: Yes. I'm a nurse, I'm a fucking E.R. nurse. I can't do this."

b) *Initial Police Entry into the House*

Corona police officers arrived at 2:14 a.m. Defendant was in the middle of the street when officers arrived. Defendant appeared upset and did not respond to the officers' questions. Defendant did not appear to have any blood on her or her clothing, and did not appear to have suffered any injuries. Defendant smelled of alcohol.

When Officer Hurtado entered the House, the victim was seated on a couch, slumped over. The victim appeared to have suffered head trauma. Officer Hurtado was unable to feel a pulse at the victim's carotid artery. While Officer Hurtado was searching for a pulse, a bubble of blood popped on the victim's mouth. Police searched

the House, and found no other person present inside the home. After the House was secured, at approximately 2:20 a.m., paramedics entered the House.

c) *Paramedics*

When paramedics entered the House, there was blood on and around the victim. The victim had a wound on the right side of his head, behind his ear. The blood was coagulated—it was no longer flowing—indicating the injury "did not just happen within a matter of minutes."

An EKG machine revealed the victim had no cardiac activity. The victim did not respond to a light being shined in his eyes. The paramedics did not hear a heartbeat via a stethoscope or see any signs of breathing. The victim's arms were somewhat rigid. It also appeared from the victim's face that "[i]t had been a period of time prior to [the paramedics] arrival" that his blood stopped circulating. The victim's skin was "pale or ashen" and his skin felt cold. The paramedics determined the victim was deceased, and did not attempt to resuscitate the victim.

d) *Detectives' Search*

When Corona Police Detective Robert Newman went to defendant's house on October 6, he was trying to locate the weapon that injured the victim. Newman did not find any blunt objects that were marked with blood or hair, or blunt objects that appeared to have been recently washed. Newman noticed two baseball bats by the front door. Newman surmised that the bats were by the door when the victim was struck because there was blood spatter on the bats. Newman did not see any golf clubs inside the residence. No potential weapons were seized from the House or vehicles. On

October 9, police officers searched the yards of the homes on defendant's street and the immediately surrounding streets, and asked if neighbors noticed anything discarded in their yards, but nothing was found.

e) *Police Station*

On October 6, Corona Police Officer Jessica Welde was asked to sit with defendant at the police station. Welde sat with defendant from approximately 2:50 a.m. to 6:00 a.m. Defendant "fluctuated from crying to being angry to being silent, as if she was reminiscing." Defendant said that if the victim's ex-girlfriend were involved in his killing then defendant would retaliate against her. Welde sat next to defendant on the floor and put her arm around defendant. Defendant also rested her head on Welde's lap. Welde did not recall smelling shampoo in defendant's hair. Defendant fell asleep at 5:50 a.m. Welde did not notice any blood on defendant.

Corona Police Detective Dan Bloomfield and Sergeant Tom Weeks interviewed defendant. During the interview, defendant said she and the victim had "complaints out" against the victim's ex-girlfriend, Shiana Lovejoy, due to Lovejoy vandalizing their car. Defendant explained that Lovejoy had threatened them and that they had a hearing scheduled for October 20 for a restraining order. Defendant said Lovejoy sent two men to defendant's house at 4:00 a.m. approximately one month before October 6. Defendant and the victim were not home, but a neighbor across the street saw the two men. Defendant believed Lovejoy sent the men because Lovejoy vandalized the car.

Defendant explained that, on October 5, she was drinking alcohol all day. She drank tequila shots at the Sportsman. Defendant argued with the victim at the

Maverick. The victim was a "very jealous" person, and defendant was a flirtatious person. Defendant was embarrassed by the victim's accusation that she was too flirtatious and decided to go home. Defendant, the victim, Dills, and Devlyn went to the House. Defendant was "very upset." Defendant and the victim argued in the driveway of their home. Defendant told the victim, "I'm leaving and I'm not hanging out with you, I'm going. I'm going with [Dills]." The victim "was very upset." Defendant got onto Dills's motorcycle, and they left.

Defendant and Dills went to Rite Aid so Devlyn could purchase ice cream for his wife. Defendant and Dills then went to Dills's house without Devlyn. Defendant and Dills talked while sitting in his hot tub. When defendant arrived home, the front door was unlocked. Defendant did not know what time she arrived home.

Defendant could see the victim laying on the loveseat. Defendant saw something was wrong. Defendant walked over to the victim and shook him. Defendant saw "a big gash on the side of [the victim's] head." Defendant heard the victim gurgling. Defendant explained, "He was fucking breathing while I was there." Defendant repeated, "He was fucking breathing." Defendant went into the kitchen and called 911.

Defendant said it was after 9:00 p.m. when the group arrived at the House from the Maverick. Defendant estimated that she was at Dills's house for two hours. Sergeant Weeks said, "[I]t's weird how [the killers] would come over there right at the time where there is a two hour period where you're not there. . . ." Defendant responded, "I don't know."

Sergeant Weeks asked if the victim was arrested for domestic abuse against defendant on August 22. Defendant confirmed the victim was arrested. Defendant explained they argued, the victim "shoved her hands down," which caused defendant to be "very upset," she wanted the victim to leave but he refused, and she called the police. At one point during the October 6 interview, a female officer took defendant's clothes from her for evidentiary purposes.

f) *Forensic Technician*

Corona Police Forensic Technician Daniel Verdugo looked for fingerprints at defendant's house, but no usable fingerprints were found. No footprints were located in or around the House. The only bloodstains in the House were in the garage and the living room. The victim's body was seated, fully dressed, on the loveseat in the living room; he was "slouched down." Drops of blood were located 360-degrees around the victim. The floor and every wall in the living room were stained with spots of blood, but there was no blood spatter on the ceiling. Blood spatter located on the back of the front door indicated the door was closed when the attack occurred. Blood spatter located on the door between the living room and the garage indicated that door was partially open when the attack occurred. Blood spatter in the garage was located on the washer/dryer set and a comforter.

Because there was blood spatter 360 degrees around the victim, it indicated that the weapon was swung horizontally toward the victim. It also indicated that the victim was attacked in the location where he was found. A long weapon, such as a golf club,

which would allow for "a big swing" could cause blood to be splattered close to 360-degrees.

In the bloodstain patterns, there were no indications of a struggle or of the victim trying to get assistance; the only disruption in the blood stains appeared to have been caused by the paramedics. In the area of the front door, where two baseball bats were located, there were no gaps in the blood spatter. In other words, it appeared the bats were in place by the door during the attack.

Various items were on the kitchen floor: some coins, pieces of glass from a broken shot glass, and a portable telephone handset. A champagne bottle was in the trash. Various items were on the floor: defendant's helmet, two novelty hats, defendant's sandals, and defendant's jacket. Defendant's sandals and helmet were on the floor behind the loveseat, in the entryway. One of defendant's novelty hats was in the entryway, beyond the back of the loveseat, in the space where one could turn into the living room. Defendant's jacket and the second novelty hat were in the living room, near the wall opposite the front door. No blood was found on defendant's helmet, hats, and jacket. The helmet was tested for blood in a laboratory, but the shoes and novelty hats were not—they were visually inspected at the House but not collected by police.

Verdugo observed that the hot tub in the backyard of the House was running, i.e., the cover was off, the water was bubbling, and the water felt warm. While Verdugo was photographing the House, defendant's dog was "creating a ruckus," being "mean," barking, and howling. Detective Newman gave Verdugo female clothing for lab testing. Verdugo found no bloodstains on the clothing.

g) *Forensic Pathologist*

Dr. Joseph Cohen was the Chief Forensic Pathologist for Riverside County. Dr. Joseph Pestaner conducted the autopsy on the victim. Pestaner worked out of state at the time of trial, so Cohen testified. The victim suffered several blunt force injuries on the right side of his face and head, in the form of abrasions, contusions, and lacerations. The victim had a group of injuries on and behind his right ear, including a complex laceration, where a large portion of the tissue on his upper right ear was torn away. The victim had a large fracture at the base of his skull, which ran from one side of his skull to the other side. The victim also had a fracture on the roof of his mouth, on the right side. The victim suffered bleeding on the surface of his brain, i.e., a subarachnoid hemorrhage.

The cause of the victim's death was blunt force injuries to his head. The primary injury causing death was a three- and three-quarter inch laceration behind his ear, which led to the fracture at the base of his skull, which then led to the subarachnoid hemorrhage. Without treatment, a person with the victim's injuries would die within one to 20 minutes, most likely within 10 or 15 minutes. The injuries would lead to bleeding into the lungs, choking on one's own blood, and then death within minutes.

"[A] lot of force" would be required to inflict the victim's injuries, such as that created by a bat, brick, or golf club, rather than a fist. It appeared the weapon used against the victim was long because several of the injuries were long and narrow. Any healthy adult—male or female—would have been capable of inflicting the victim's

injuries. It appeared the victim was struck three to eight times. The victim's injuries would have caused him to lose consciousness "nearly immediately."

The victim had no injuries on his hands. There were no defensive injuries on the victim's body. It was not possible to decipher from the injuries where the attacker was located in relation to the victim at the time the injuries were inflicted.

h) *Interview of Defendant*

Senior Detective Ron Anderson and Sergeant Weeks interviewed defendant on October 9, 2003. Defendant described the clothes she wore on October 5: "I had my shoes, my jeans; I don't know what shirts we decided to wear that night. We usually wear matching clothes." Defendant described her personality: "I talk, I hang out, I touch, I touch you know." Defendant described the victim at the Maverick: "[H]e was always by me though. He's always by me. He never leaves me alone. He never leaves me alone. He walked me to the bathroom. He walked me to the bathroom."

Defendant said that, in addition to the alcohol, she took two Vicodin pills at approximately 6:30 p.m. on October 5 when Dills, Tabitha, defendant, and the victim were at the House. Defendant said the group arrived at the Maverick between 7:00 and 8:00 p.m., and it was dark outside. Defendant and the victim argued at the Maverick.

After arriving home from the Maverick, defendant pushed the victim. Defendant thought they arrived home from the Maverick at midnight; however, she discovered the victim called her cell phone at 11:16 p.m. on October 5. As a result, she was unsure when the group arrived at the House but surmised it was after 11:00. Defendant believed she must have been at Dills's house when the victim called at 11:16.

Defendant did not know what time she left Dills's house, but estimated the drive to the House took five to six minutes due to Dills not stopping at red lights or stop signs. Defendant did not recall stopping outside the House and Dills shining his motorcycle headlight so she could pick up anything. When defendant entered the House, she removed her shoes, turned on the light, saw blood on the loveseat's armrest, thought the victim had been in a fight, walked over to the victim, saw his injuries, screamed, and went to get the telephone.

Defendant explained that the 911 operator asked defendant if defendant could help the victim. Defendant walked over to the victim, grabbed his arm, shook him, and pulled him up. At that point, the victim gurgled. Defendant thought the gurgle was the victim's death rattle. Defendant let go of the victim and "freak[ed] out."

Detective Anderson told defendant that Dills recalled going to bed and setting his alarm, after dropping off defendant at the House. When he set his alarm it was 1:36 a.m. Anderson told defendant a neighbor heard defendant and the victim arguing in the garage at 1:30 a.m. The detective asked defendant what she did for the approximately 55 minutes between being dropped-off by Dills and calling 911. Defendant said, "No, no. They're wrong, they're wrong, that did not, no, no." Anderson asked, "You beat your husband with a hammer?" Defendant responded, "No. Because I'm a fuck, I don't even remember doing that." Defendant repeated, "I don't remember doing that." Anderson asked, "When you drink is there times when you black out?" Defendant responded, "Not [*sic*], I mean there are things I don't remember. Yeah, things I don't remember."

Detective Anderson told defendant that her dog never barked during the killing. Anderson said that if a stranger were in the House then the dog would have barked, and defendant agreed. Anderson remarked, "He sure in the hell barked at all of us." Defendant also agreed that the dog would not bark at her.

Detective Anderson again asked defendant what happened during the 55 minutes she was at home prior to calling 911. Defendant said there was not a 55-minute gap. Defendant said she walked into the House, saw the victim was injured, and called 911. Anderson said no stranger could have been in defendant's backyard "without that damn dog barking." Defendant agreed.

Detective Anderson asked defendant why she was not crying and why she contacted Dills to instruct him to lie to police about their sexual encounter, i.e., to deny any sexual contact had occurred. Defendant explained that she was embarrassed about her sexual contact with Dills. Anderson asked where the golf club went that was stored by the front door of defendant's house. Defendant said a golf club was not stored by the front door.

Defendant did not know who drank the bottle of champagne that was discarded at her and the victim's house. Defendant admitted that the first time Dills orally copulated defendant was "[a] few months back"—before October.

5. Defendant's Testimony from the First Trial

The prosecutor presented defendant's testimony from her first trial. Defendant recalled that on October 5 she wore "jeans and a studded belt to match [her] shoes and a black shirt with a design on it. But it had little ringlets that matched [her] necklace."

Defendant explained that she had been drinking alcohol on October 5; in particular she had approximately 10 shots within "[a] few hours," when they were at the Sportsman. Defendant did not know what time the group arrived at the Maverick, but it was "right about ready to get dark" outside.

Defendant drank shots of alcohol at the Maverick. After "a few hours" at the Maverick, defendant and the victim argued. Defendant rode to the House with Devlyn, rather than the victim, because she was upset with the victim and Dills. At the House, defendant "said a lot of stuff" to the victim, such as she wanted him to leave. Defendant "was very upset." The victim tried to pull defendant into the House, but defendant did not want to go inside. Defendant pushed the victim and threw things at him. Defendant struck the victim with her purse and her helmet.

Defendant left with Dills. Defendant did not know what time she left with Dills. The ride to Dills's home took 10 to 15 minutes. Defendant did not know how long she was at Dills's home. Defendant admitted telling Dills she "could just kick [the victim's] ass," because she blamed the victim for her presence at Dills's home.

When Dills drove defendant home, he turned off his motorcycle near the House and coasted so as to not wake the victim. Defendant did not know what time Dills dropped her off, but she believed it was "real late." Defendant had been unable to find her cell phone and her keys. Dills suggested she look in the bushes outside the House because they could have fallen out when she struck the victim with her purse. Defendant may have found her cell phone in the bushes.

The door was unlocked, and defendant walked inside the House. Defendant carried her novelty hats, her helmet, and her purse into the House. Defendant heard Dills start his motorcycle and leave. Dills's motorcycle triggered defendant's car alarm. Defendant's car was parked across the street from the House.

The lights were off in the House. Defendant saw the victim sitting on the couch. Defendant removed her shoes. She turned on the lights. Defendant "could see something was wrong"; she thought the victim had been in a fight. Defendant walked over to the victim, to the side of the couch, and looked at him. She saw "[s]omething was wrong with his ear . . . something was wrong with his head." Defendant ran outside and down the street to look for Dills, but she did not find him. Defendant called 911.

The 911 operator asked if defendant could assist the victim. Defendant thought she saw the victim breathing, e.g. his chest rose, therefore she did not perform CPR. Defendant removed her jacket, grabbed the victim's hand, and tried to pull him up. The victim gurgled. Defendant screamed and then ran outside. Police arrived while she was outside. Defendant did not recall getting any blood on her after touching the victim.

Defendant believed Dills was incorrect about dropping her off at 1:30 a.m. because defendant called 911 at 2:09 a.m., and she called 911 close in time to when she arrived home. Defendant could not think of any reason that Dills would lie to the police about the time he dropped her off.

6. The Victim's Ex-Girlfriend

The victim's ex-girlfriend and mother of his child was Lovejoy. Their relationship ended in late 2001 or early 2002. When the victim moved into defendant's

home, the victim stopped providing the same level of child support to Lovejoy, which upset Lovejoy. Lovejoy blamed the victim's relationship with defendant for the change in child support.

Lovejoy and defendant made harassing phone calls to one another. Lovejoy left a message threatening to "slash the throats" of defendant and the victim. In September 2003, Lovejoy vandalized the victim's truck while it was parked in the driveway of the House. Lovejoy was angry, so she wrote "asshole" and "deadbeat" with a black marker on the victim's truck. Also in September 2003, Lovejoy sent a letter to defendant. In the letter, Lovejoy asserted she and the victim had a sexual relationship while defendant and the victim were in a romantic relationship. Lovejoy sent the letter for the purpose of angering defendant.

In October 2003, Lovejoy was dating Oscar Castaneda. On October 5, 2003, Castaneda and Lovejoy went on a date. Lovejoy picked-up Castaneda from his home in Whittier, where he lived with his mother. They had drinks at a restaurant in Cerritos, where Castaneda paid with a credit card. At approximately 10:30 p.m., they left the restaurant and went to a motel in Whittier where Castaneda paid cash for the room and no record of their stay was made. They left the motel between 12:30 and 1:15 a.m. Lovejoy dropped off Castaneda at his home. Lovejoy arrived at her home in Anaheim at approximately 1:15 a.m. and called a friend. Lovejoy was not away from Castaneda for more than five minutes during their date. The motel's general manager recognized Castaneda as a customer.

7. Defendant's Ex-Husband

Defendant's ex-husband was Joe Bugarski. Defendant and Bugarski married in 2000. They shared a son. On Christmas 1999, Bugarski was upset that defendant spent time at her friend's house. When defendant arrived home, she threw a plate of food at Bugarski. The fight moved outside. Defendant armed herself with a baseball bat. Defendant held the bat in a swinging position, with her hand or hands at the lower end of the bat.

In June 2000, defendant tackled Bugarski, Bugarski slapped defendant, defendant struck Bugarski's head with a phone, Bugarski pushed defendant over a couch, defendant retrieved a butter knife, Bugarski took the knife from defendant, and he tackled her to the ground. Bugarski held the knife to defendant's throat and said, " 'Don't ever do that again or I'll kill you.' " Bugarski said, " 'I'll fucking kill you, bitch.' " Defendant called the police.

In March 2003, defendant called Bugarski and said, "Come home, get all your shit out of the house, and I want you out of the house." Defendant told Bugarski, "[D]on't try anything, because I'm going to have the cops here." When Bugarski arrived at the House, police, the victim, and defendant were there.

Bugarski had never before met the victim. Bugarski suspected defendant was having an affair, so he stalked her. Bugarski had access to defendant's house after moving out because he temporarily cared for their son at defendant's house while defendant was at work. Bugarski set up a spy camera in an air conditioning vent in the

House, and set up a voice activated tape recorder under defendant's bed to record defendant's phone conversations.

One night in April, Bugarski followed defendant to see with whom she was going out. After following defendant "around town," Bugarski waited at defendant's neighbor's house for defendant to arrive home. Bugarski watched defendant and the victim arrive home. Bugarski then walked to a window at the side of defendant's house to listen to defendant and the victim's conversation. After hearing defendant and the victim say, "I love you" to one another, Bugarski stopped stalking defendant.

The victim moved into defendant's house one or two weeks after Bugarski moved out. Bugarski and the victim spoke on the telephone. Bugarski said to the victim, "You're an asshole. What kind of man are you, moving into someone's house after a father is forced out[?]" Bugarski threatened to "kick [the victim's] ass." Over the next six months, Bugarski saw the victim two or three times, and they "never had any problems."

In October 2003, Bugarski was dating Chelsea Murray. On the night of October 4, 2003, Bugarski and Murray were camping with one of their friends and three children. On October 5, they returned home. They ate dinner with Murray's parents. Bugarski was scheduled to return his and defendant's son to defendant at 9:00 p.m.; however, the son did not want to go to defendant's house. Therefore, at approximately 7:30 p.m., Bugarski called defendant and left a message explaining that their son would stay with Bugarski for the night. Defendant and Bugarski spoke between 8:00 p.m. and

9:00 p.m., and defendant told Bugarski to keep their son because she was not "going to be home anyways."

At 8:00 p.m., Bugarski and his son fell asleep on the bed in Murray's room. The bed is a futon bunkbed with a full-sized futon on the bottom, and a twin bed on top. Bugarski and his son fell asleep on the bottom bed. At approximately 10:00 p.m., Murray went to sleep. Murray also slept in the bottom bed, on the side closest to the bedroom door. Murray and Bugarski awoke at 5:00 a.m. when Bugarski's cell phone vibrated. Nothing else disturbed Murray's sleep that night.

C. *DEFENDANT'S CASE*

Rosa Whisler lived on defendant's street; there was one house between the House and Whisler's house. On October 6, Whisler heard a woman screaming, " 'Oh, my God. Oh, my God.' " Whisler saw defendant running in the street and then police arriving. Brian Foster lived near defendant's house. On October 6, Foster awoke to a car alarm between 1:30 a.m. and 2:30 a.m.

Linda Alexander lived across the street from defendant's house. At approximately midnight, Alexander heard a motorcycle. Alexander looked across the street and saw two men and one woman standing near the garage. It appeared they were arguing. Alexander heard a car alarm between 1:30 and 1:45 a.m. Approximately five minutes later, Alexander heard a motorcycle traveling away from the street; however, Alexander was not positive about the order of the alarm and the motorcycle sound. Five to 10 minutes later, Alexander heard defendant screaming, " 'no, no, no.' "

On June 6, 2000, Police Officer Jerry Pawluczenko responded to a domestic violence call at defendant's house involving defendant and Bugarski. Pawluczenko saw lacerations on defendant's chest and neck, a red mark on her cheek, and an abrasion on her right forearm.

Defendant testified at her trial. It was 11:00 p.m. when defendant arrived home from the Maverick, before going to Dills's house. After being at Dills's house, defendant located her cell phone in the bushes. When defendant entered the House early on October 6, she removed her sandals. As defendant walked into the House, she dropped her helmet on the floor, then some distance away she dropped one novelty hat on the floor, in another location she dropped the second novelty hat. Defendant turned on the light in the living room. Defendant walked over to the victim and yelled at him for being in a fight. Defendant then realized something was wrong. Defendant ran outside to locate Dills. Defendant believed the victim was breathing, but did not provide medical assistance to him. Defendant went back inside the House and called 911.

D. *PROSECUTOR'S CLOSING ARGUMENT*

In the prosecutor's closing argument, he asserted defendant became upset with the victim at the Maverick, defendant argued with the victim in their driveway, and defendant physically attacked the victim in their driveway. The prosecutor contended the fight in the driveway occurred near midnight, based upon the neighbors' testimony. Defendant then left with Dills, and returned between 1:20 a.m. and 1:30 a.m. The prosecutor theorized that when defendant entered the House, she confronted the victim.

Defendant attacked the victim and killed him. Defendant then cleaned-up and disposed of evidence before calling 911 at 2:09 a.m.

E. *DEFENSE COUNSEL'S CLOSING ARGUMENT*

Defense counsel, Keen, asserted Virga heard the driveway argument at 11:50 a.m., and Alexander saw two men and a woman in defendant's driveway at 12:00 a.m. Keen argued that defendant's car alarm was triggered at 2:00 a.m. by Dills's motorcycle. Alexander heard a motorcycle leaving at 2:00 a.m. and saw defendant running into the street shortly thereafter. Keen argued defendant did not arrive home until 2:00 a.m. and therefore lacked the opportunity to commit the crime. Keen asserted that, after being at Dills's house, defendant arrived home, took off her shoes, dropped the items she was carrying such as her helmet, walked to the light switch, walked over to the victim, ran outside looking for Dills, came back inside, and called 911.

In regard to Dills's testimony that the group arrived at defendant's house at 10:00 or 11:00 p.m. after the Maverick, Keen asserted Dills was incorrect about the timing because the group was not at the House until close to midnight. Alternatively, Keen asserted that if Dills were accurate then it was another woman who was in the driveway at midnight; the other woman being Lovejoy due to Lovejoy lacking any records that she was actually at the motel at the time of the killing.

Keen argued that at 2:20 a.m., the victim's skin was pale and cold, the blood from the injury had coagulated, and the victim's pupils were fixed and dilated. Keen said, "Meaning, quote, unquote, death did not happen within minutes." Keen explained there was evidence of the blood settling, lividity, and some rigidity. Keen said it had

been "[q]uote, . . . a 'period of time' " between the infliction of the injury and paramedics examining the victim.

Keen noted that a weapon was never found and no evidence of the crime was found in defendant's or the victim's vehicles. Keen pointed to the evidence that blood spatter was found on every wall in the living room, including "a fine mist of blood" on a table. Keen argued that there was no blood on defendant or on any of the items that defendant brought into the House with her—the helmet, the novelty hats, her jacket, or her shoes. Keen asserted there was no evidence of defendant having changed her clothes, and no evidence that the shower was wet when police arrived.

F. *CONVICTION AND POST-CONVICTION PROCEEDINGS*

1. Verdict

The jury found defendant guilty of second degree murder. (§ 187, subd. (a).)

2. Motion for New Trial

Defendant filed a motion for new trial. (§ 1181.) The motion was based upon (1) the jury's verdict being contrary to the law or evidence; and (2) defendant being guilty of voluntary manslaughter, rather than second degree murder. Keen argued the jury was wrong to disbelieve Alexander, and that it seemed to accept the testimony of Dills, whom the jury could not see for purposes of judging his credibility.

In regard to voluntary manslaughter, Keen asserted that because the jury rejected first degree murder, it found the crime was completed in the heat of passion. Keen argued it was his fault for declining the voluntary manslaughter instruction and going with an "all or not[hing]" defense.

The trial court prefaced its remarks as follows: "To make a perfectly clear record in this matter, if this was a court trial, if the Court would have heard the evidence in this case, I would have found the defendant not guilty. I would have found that the evidence was insufficient to prove beyond a reasonable doubt. That is my trial court decision in this case. Obviously, it was not a court trial. It was a jury trial."

The court explained that the jury disbelieved defendant and believed Dills. The court said that the use of Dills's preliminary hearing testimony, when Dills was not extensively examined due to the lower burden of proof at a preliminary hearing, was "a substantial issue in this case." The court continued, "And it is, when I say it's disturbing for this Court, it's an understatement." The court said the issue was one for the appellate court. The trial court denied defendant's motion for new trial in regard to the verdict being contrary to the law or evidence.

In regard to the voluntary manslaughter instruction, the trial court explained: "There's no evidence before the Court as to what happened at the time of the incident. The jury was not given the opportunity to consider a voluntary manslaughter. And if there was evidence of that, um, in the record is void of that. All we have is that [the victim] was struck three to eight times with a blunt force instrument." The court denied defendant's motion in regard to defendant's offense being voluntary manslaughter.

3. Appeal

Defendant filed an appeal in this court. Defendant raised the following issues: (1) insufficient evidence; (2) the trial court applied an incorrect standard when ruling on the motion for new trial; (3) the trial court erroneously admitted evidence of defendant's

prior acts of domestic violence (Evid. Code, § 1109); (4) Evidence Code section 1109 is unconstitutional; (5) the jury instruction concerning prior acts of domestic violence is defective (CALJIC No. 2.50.02); and (6) the trial court erred by excluding the exculpatory results of defendant's polygraph examination. (*People v. Long* (Nov. 21, 2008, E039986) [nonpub. opn.] [2008 Cal. App. Unpub. LEXIS 9448, *2].) This court affirmed the judgment. (*Id.* at p. *64.)

4. Federal Writ Petition

Defendant petitioned the United States District Court, Central District of California, for a writ of habeas corpus. Defendant asserted: (1) there was insufficient evidence to support her conviction; (2) the trial court applied an improper standard when ruling on defendant's motion for new trial; (3) the trial court erred by admitting evidence of prior domestic violence; and (4) the trial court erred by excluding evidence of defendant's exculpatory polygraph examination. (*Long v. Lattimore* (March 16, 2012, CV 10-277-PSG) [2012 U.S. Dist. LEXIS 56652, *1-2].) In April 2012, the district court denied defendant's petition. (*Long v. Lattimore* (April 19, 2012, CV 10-277-PSG) [2012 U.S. Dist. LEXIS 56655].) The district court granted a certificate of appealability on the issue of sufficiency of the evidence.

5. Federal Appeal

Defendant appealed to the United States Court of Appeals for the Ninth Circuit. Defendant argued the issue of insufficient evidence. (*Long v. Johnson* (2013) 736 F.3d 891, 896.) The appellate court wrote, "Were we the jury, we might have entertained a reasonable doubt. Were we sitting as the reviewing court on direct appeal, we might

have found the evidence to be insufficient. But under [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)], which demands double deference, we are limited to deciding whether the California courts unreasonably applied *Jackson*[3]. They did not." The federal appellate court affirmed the order of the district court. (*Id.* at p. 897.)

In a concurring opinion, Circuit Judge Watford wrote, "I have grave doubts about whether the State has convicted the right person in this case. Those doubts stem from the fact that it would have been virtually impossible for the defendant to commit the crime and eliminate all traces of her involvement even if she had arrived home at 1:20 a.m., as the State contends . . . I am also troubled by the fact that the only witness who placed the defendant at home as early as 1:20 a.m. never actually testified at trial. . . . [¶] Despite these misgivings, I join the court's disposition. As the court notes, one of the inevitable consequences of the doubly deferential standard of review we must apply under AEDPA 'is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold.' " (*Long v. Johnson*, *supra*, 736 F.3d at p. 897 [conc. opn. of Watford, J.].)

G. *STATE WRIT PETITION*

1. Superior Court

Defendant petitioned the Riverside County Superior Court for a writ of habeas corpus. Defendant asserted: (1) her trial counsel rendered ineffective assistance; (2) the

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3 *Jackson v. Virginia* (1979) 443 U.S. 307.

prosecutor committed misconduct; and (3) defendant is actually innocent. The trial court denied the writ petition due to the petition failing to present a prima facie case.

2. Court of Appeal

In an original proceeding, defendant petitioned this court for a writ of habeas corpus. (Cal. Const., art. VI, § 10.) Defendant raised the same three issues she raised in the trial court, and additionally contended the trial court erred by concluding she failed to present a prima facie case. This court summarily denied defendant's writ petition. (*In re Long* (Jan. 12, 2015, E062484).)

3. Supreme Court

In an original proceeding, defendant petitioned the California Supreme Court for a writ of habeas corpus. (Cal. Const., art. VI, § 10.) Defendant raised the same four issues she raised at this court: (1) her trial counsel rendered ineffective assistance; (2) the prosecutor committed misconduct; (3) defendant is actually innocent; and (4) the trial court erred by concluding she failed to present a prima facie case.

In regard to ineffective assistance of counsel, defendant asserted her trial counsel, Keen, was ineffective, in part, because he did not conduct a reasonable investigation into the case. In particular, defendant faulted Keen for (1) failing to consult a time of death expert, and (2) failing to prove defendant did not change her clothing on the night of the killing.

First, as to the time of death expert, defendant asserted that if Keen had consulted an expert then the jury would have learned that the victim died prior to 1:20 a.m. The declaration of Dr. Harry James Bonnell was included as an exhibit. Bonnell explained

that he has worked as a Chief Deputy Medical Examiner in San Diego and Chief Deputy Coroner in Hamilton County, Ohio. Bonnell declared that, in his opinion, the post-mortem changes in the victim's body could not have occurred in less than one hour. Therefore, Bonnell opined that the "time of death is more consistent with 11:00 p.m." Bonnell explained that if an outgoing text message and phone call from the victim's phone, placed at 11:39 and 11:40 p.m., were made by the victim, and it was the victim heard swearing in the garage at 12:30 a.m., then the victim died shortly thereafter.

The declaration of Dr. Zhongxue Hua was also included as an exhibit. Hua was a practicing forensic pathologist. Hua opined that the victim died "long before 1:20 a.m." based upon the evidence of lividity and rigidity.

Second, as to the clothing, defendant asserted that in Dills's police interview, Dills described the clothing defendant was wearing on October 5 and it matched the clothes defendant was wearing when police arrived at defendant's house. Specifically, Dills said defendant was wearing "a black tee shirt that had some designs on [*sic*], I'm thinking biker, rock and roll stuff or something. What I remember was like little rings, chain, like a chain. It looked like a chain that was like part of the shirt" and "she was wearing blue jeans, kinda low rider blue jeans and . . . she had a black belt on." Defendant asserted Keen rendered ineffective assistance by not seeking to have this portion of Dills's interview admitted into evidence because the killer would have blood on his/her clothing, and therefore, if defendant killed the victim there would have been

blood on the clothing police seized because the seized clothing matched the clothing described by Dills.

The California Supreme Court issued an order to show cause before the trial court as to "why trial counsel was not ineffective in his failure to: consult a time of death expert [and] present evidence [defendant] did not change her clothes . . . ."

4. People's Return

The People filed a Return to defendant's petition along with a memorandum of points and authorities and exhibits. Among the exhibits were cell phone records and an autopsy protocol.

a) *Cell Phone Records*

The victim and defendant's cell phone records reflect (1) a text message was sent from the victim's phone to defendant's phone on October 5 at 11:39 p.m.; and (2) a one-minute call was made from the victim's phone to a phone number in Pomona on October 5 at 11:40 p.m. The records for defendant and the victim's phones do not reflect a call from the victim's phone to defendant's phone at 11:16 p.m. on October 5.

b) *Autopsy Protocol*

On October 7, 2003, at 9:36 a.m., Dr. Pestaner conducted an autopsy on the victim. On October 7, Pestaner observed the victim's "[r]igor mortis is mild to moderate and symmetric."

5. Hearing

We present the evidence from the trial court's evidentiary hearing on the order to show cause.

a) *Defendant's Evidence*

i. *Coroner's Report*

The coroner's investigation report, which was prepared by Deputy Coroner Gomes, reflected, "Rigor had not started. Lividity was almost fixed, with medium discoloration, and consistent with his position." The report provides that Gomes was contacted by police at 3:39 a.m. on October 6, 2003, and asked to come to the House. Gomes arrived at 5:03 a.m. Gomes recorded the temperature in the House was fair at 6:11 a.m.

ii. *Dr. Hua*

Dr. Hua was a physician, forensic pathologist, and neuropathologist. Hua worked in Rockland County, New York, and Northampton County. He had performed 3,000 autopsies. Hua estimates time of death by looking at room temperature, body temperature, rigor/body stiffness, lividity, and decomposition. In the instant case, Hua estimated "the time of death occurred long before 1:20 a.m." because (1) at 2:20 a.m., the paramedics noted the victim's body was cool, there was lividity, and there was rigor; and (2) at 5:03 a.m., Gomes observed the victim's "body had almost fixed lividity." Lividity concerns blood settling in the soft tissues of the body.

Dr. Hua explained that it typically takes eight to 12 hours for fixed lividity to occur. It was unclear what Gomes meant by "almost fixed lividity," so Hua assumed it meant 50 percent lividity that therefore it would take approximately four hours for almost fixed lividity to occur, which would mean the death occurred at 1:03 a.m. if Gomes's observations were made at 5:03 a.m. when he arrived. Rigor can be noticeable

within 30 minutes to two hours after death. Hua asserted that Gomes concluded rigor had not yet started after 5:03 a.m. because the paramedics broke the rigor when they arrived around 2:30 a.m. If a body's rigor is near its maximum point and the rigor is then broken, rigor will not return. Hua explained that he did not rely on defendant's observation that the victim was still breathing at 2:09 a.m. because defendant was intoxicated.

When asked what the earliest and latest times were for the victim's time of death, Dr. Hua responded, "That's a slippery ground question. I cannot say that. All I can say is way, way long hours. I'm not talking ten minutes, five minutes earlier than 1:20. I'm talking long, long before 1:20." When asked if he would put his estimate into numbers, i.e., a timespan indicated by hours and minutes, Hua responded, "I would not."

iii. *Dr. Bonnell*

Dr. Bonnell was a forensic pathologist who consulted on legal cases. He worked as a Chief Medical Examiner in San Diego County for 10 years. When Bonnell determines a time of death, he considers factors such as the body's temperature, rigidity, lividity, and the last time the decedent was seen alive.

The victim's temperature was not taken after his death. Based upon lividity alone, Dr. Bonnell would estimate the victim died by 12:20 a.m. at the latest. Based upon rigidity alone, as observed by the paramedics, Bonnell would estimate the victim died "closer to 11:00 p.m." In regard to Gomes's observation that rigor had not yet started, Bonnell opined that, if the observation were made at 7:00 a.m., then the rigor may have happened and ended at that point because rigor can pass eight hours after

death. Bonnell asserted it was medically inconsistent for Gomes to observe that lividity was almost fixed while at the same time concluding rigor had not yet started. Bonnell explained that rigor and lividity "both occur after death" and "[y]ou can't have one without the other." Bonnell estimated that based upon rigor and lividity, the victim died "shortly after 11 o'clock at night."

Dr. Bonnell did not rely upon Alejandro's statement that he heard the victim swearing in the garage at 12:30 a.m. However, if (1) Alejandro were accurate; and (2) the 11:40 p.m. phone call from the victim's phone was made by the victim, then the victim "would have had to die very shortly thereafter." With that evidence, Bonnell estimated the victim died between 11:40 p.m. and 12:30 a.m.

Dr. Bonnell did not read Juanita's testimony reflecting she heard the victim in the garage at 1:30 a.m. Bonnell did not know defendant was a nurse, but he would not have relied upon her observation that defendant was breathing at 2:09 a.m. because she was intoxicated. Bonnell relied primarily upon the paramedics' observations. Bonnell ultimately opined that the victim died between 11:00 p.m. and 12:30 a.m.

iv. *Gary Gibson*

Gary Gibson was a public defender in the San Diego County Public Defender's Office for approximately 25 years. Gibson worked on two cases that involved time of death issues. Gibson has also lectured on time of death analysis. Gibson believed the time of death issue was crucial in defendant's case and could not understand why Keen did not seek a time of death expert. Gibson opined that Keen's rejection of the time of death defense fell below a reasonable standard of care.

Gibson believed the issue of defendant's clothing was crucial, yet "it wasn't presented at all." Gibson explained that if the evidence established defendant did not have blood on her clothing, then the prosecution would have had difficulty proving its case because "it would have been almost impossible for whoever killed [the victim] not to have received blood on their clothing." Gibson explained that Keen should have supported defendant's testimony about her clothing with Dills's statement to the police.

Gibson asserted "a reasonably competent attorney would have at least attempted in limine to introduce Jeff Dills' statement to the police department—at least a portion of that statement that talked about the clothing that [defendant] had on when he dropped her off at the house." Gibson opined that Keen's failure to question Dills about defendant's clothing at the preliminary hearing and/or move the court to admit Dills's statement to police fell below a reasonable standard of care.

v. *Keen*

Keen, defendant's trial counsel, began working at the Riverside County Public Defender's Office in 1997. Keen worked on defendant's case from 2003 to 2006. Keen thought it was "very likely" that the person who killed the victim would have blood on his or her person as a result of the killing. At trial, in order to establish defendant did not change her clothing, Keen presented defendant's testimony and Officer Welde's testimony—the officer who sat with defendant on October 6.

Prior to the preliminary hearing, Keen had a copy of Dills's statement to police describing defendant's October 5 clothes. At the preliminary hearing, Keen did not question Dills about defendant's October 5 clothing. Keen had no tactical reason for

not questioning Dills about the clothing. Keen did not think defendant's clothing was a critical issue at the preliminary hearing. When asked why he did not think the issue was critical, Keen responded, "It was a preliminary hearing. I didn't—I didn't ask those questions at [the] preliminary hearing. I don't know why not. I should have."

At trial, Keen did not move the court to admit Dills's statement describing defendant's October 5 clothing. Keen thought he had sufficient evidence concerning defendant's clothing with defendant's testimony and Officer Welde's testimony. The direct evidence at trial concerning defendant's clothes was presented only by the defense and it reflected defendant did not change her clothes.

Keen did not employ a time of death defense at trial because "it was [his] opinion that [he] would not be able to establish time of death prior to 1:30." Keen had taken "MCLE training and education for attorneys, homicide seminars, stuff of that nature" concerning time of death opinions. From that education Keen concluded "that anybody who testified regarding time of death would have to give a range, and that the times we were dealing with in [defendant's] case were too small, and then necessarily that range would encompass both theories, the prosecution's theory and [the defense's] theory."

When assessing the time of death issue, Keen had the evidence that (1) Juanita heard the victim in his garage at 1:30 a.m., (2) that defendant, who was a nurse for approximately four years, observed the victim breathing at 2:09 a.m., (3) the coroner's report reflecting Gomes's conclusion that rigor had not yet started; and (4) a police report that reflected the people removing the victim's body from the crime scene were at

the crime scene from 6:57 a.m. to 7:13 a.m., which indicated Gomes observed the victim's body between 5:09 a.m. and 6:57 a.m.

Prior to trial, Keen consulted Dr. Vomhof, who holds a Ph.D.—he was not a medical doctor. Vomhof was a biochemist and physiologist. Keen contacted Vomhof to discuss whether "a small, short, light woman" could have inflicted the victim's injuries. Keen also discussed time of death with Vomhof. Keen did not recall what Vomhof said about the time of death issue. Keen did not contact a forensic pathologist to discuss time of death.

Keen thought the best defense was to argue that someone other than defendant killed the victim, especially due to the lack of forensic evidence tying defendant to the crime scene. In other words, Keen chose to focus on the killer's identity. Keen thought Lovejoy was the "best suspect." Keen believed evidence about Lovejoy "introduced quite a bit of reasonable doubt." Keen also presented Bugarski as a possible suspect.

vi. *Rogers*

Michelle Rogers was defendant's appellate counsel for her direct appeal. Rogers spoke to Keen while working on defendant's appeal. Rogers asked Keen why Dills's statement describing defendant's clothes was not admitted at trial. Keen said, "I didn't think there was any way I could have gotten that in." Rogers agreed there was no direct legal authority for admitting Dills's hearsay statement. Rogers opined that "[i]t would

be difficult" to have Dills's statement admitted, but Keen could have sought to have Dills's hearsay statement admitted under a due process exception to the hearsay rule.[4]

vii. *Sylvester*

William Sylvester was an investigator for the Riverside County Public Defender's Office. Sylvester worked with Keen on defendant's case. Sylvester believed Lovejoy or Bugarski could have killed the victim. Sylvester suspected Lovejoy because there were no motel records supporting Lovejoy's alibi and Lovejoy threatened to slash the victim's throat approximately one week before he was killed. Sylvester suspected Bugarski because items missing from the House after the killing had been hidden in the House prior to the killing, e.g., a shotgun hidden in a closet, and Bugarski was one of the few people that knew where the items were hidden. Also, Bugarski "had done some very odd things [while] stalking" defendant. Sylvester collected defendant's shoes, jacket, and one or both novelty hats. He had the items tested for blood. The tests revealed no blood on the items.

viii. *Defendant*

Defendant did not recall ever seeing the victim speak to the neighbors. For example, she never saw him speak to Juanita. However, defendant worked a full time

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[4] This court asked the parties to brief the issue of whether Rogers has a conflict of interest in representing defendant on appeal in the instant case, when Rogers was a witness at the hearing on the order to show cause. Defendant and the People contend Rogers does not have a conflict of interest in this case. We have examined the record, briefing, and relevant model and proposed rules and conclude Rogers does not have a conflict of interest. (Cal. Rule of Prof. Conduct, Proposed Rule 3.7; ABA Model Disciplinary Rule 5-101(B).)

job, and the victim was not regularly employed, so she was not always present at home when the victim was at home.

During the driveway fight on October 5, defendant told the victim that he " 'needed to leave,' " which meant he needed to move out of the House. While in the driveway, defendant had the novelty hats and her purse on her arm. Some items fell out of her open purse when she struck the victim, and she left those items behind when she left with Dills. Defendant also struck the victim with her helmet. Defendant took the novelty hats to Dills's house, and returned to the House with the hats on her arm.

On October 5, defendant wore "large sandals that matched [her] black belt, blue jeans, [a] black shirt with ringlets on it that matched [her] necklace and [her] purse." Specifically, the shirt was a "black shirt with no sleeves, and it had ringlets on it, silver ringlets." When dressing at Dills's house, defendant did not put her panties on. Defendant denied changing her clothes prior to police arriving at the House on October 6.

When defendant arrived home after being at Dills's house, she thought the victim had been in a fight. Defendant called 911. The 911 dispatcher asked defendant to help the victim. Defendant pulled on the victim's arm and "he made a noise." At trial, defendant testified that the victim was breathing; however, at the hearing on the order to show cause, defendant was not 100 percent sure the victim was breathing when she called 911. Defendant denied killing the victim and denied staging the crime.

b) *People's Evidence*

i. *Dr. Cohen*

Dr. Cohen was a forensic pathologist who worked with Napa, Sonoma, and Marin Counties. Cohen worked in the Riverside County Coroner's Office. He has performed approximately 7,000 autopsies. The development of rigor depends upon environmental factors, such as the temperature in the House. In the coroner's report, Gomes described the indoor temperature as "fair." Cohen did not know what temperature qualified as fair. Rigor can develop "within minutes to an hour or two," although it does not always develop within two hours. Cohen would expect rigor to develop in most cases within four to six hours of death. Cohen explained, "there's so much individual variation," in relation to when rigor starts to develop. Cohen did not believe the paramedics broke the rigor because breaking rigor "requires significant manipulation of the body," in that each joint would need to be individually manipulated.

Lividity can become apparent within 45 minutes of death. Dr. Cohen disagreed that lividity would have been almost fixed at the time of Gomes's observations of the victim's body because if it were close to fixed, then the victim would have died "at least 8 to 12 or 24 hours earlier," and Cohen believed the evidence reflected the victim was alive at 11:00 p.m.

As to the victim's temperature, a paramedic testified that the victim's skin felt cold. It was unclear what temperature was meant by "cold." Dr. Cohen explained that if the paramedic touched the victim's extremity, then "they feel cool very frequently"

during the process of dying. Cold skin does not necessarily mean the body temperature is cold.

Dr. Cohen explained, "[T]here's some issues with first responder accounts and deputy coroner accounts relating to livor mortis and rigor mortis. There's a little bit of discrepancy, and some of it just doesn't quite make sense. [¶] How can you have some rigor mortis in the upper extremities at 2:15 or 2:20 in the morning and have no rigor mortis at 5:00 or 6:00 in the morning? It doesn't make sense. [¶] You know, my—my opinion on this is that the death could have occurred before or after 1:20. I would not pin it down to either before or after 1:20 with any degree of certainty, certainly with respect to what's riding on it here in court today. [¶] So I would—my opinion is that it could have happened before 1:20. It could have happened at 1:45 or 1:30 in the morning. So that's the best I can do. That is the best, in my opinion, that science is able to offer."

Dr. Cohen explained that one could not reasonably conclude the victim died prior to 1:20 because, in order to make that conclusion, one would have to rely only upon select pieces of evidence, such as the paramedics' observations and Gomes's lividity observation in the coroner's report.

ii. *Blood Spatter*

Most of the blood in the living room was to the northeast of the victim's body. It is possible that if the killer were standing to the northwest of the victim, then no blood would have landed on the killer.

c) *Trial Court's Ruling*

The trial court found Keen's performance fell below an objective standard of reasonableness in that Keen (1) failed to consult a qualified time of death expert, and (2) failed to establish that defendant did not change her clothes prior to police arriving at the House. The trial court found the errors were prejudicial. The trial court vacated defendant's conviction. The trial court set bail for defendant in the amount of $50,000.

DISCUSSION

A. CONTENTION

The People contend the trial court erred by finding Keen rendered ineffective assistance.

B. LAW

"Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. [Citations.] Specifically [s]he is entitled to the reasonably competent assistance of an attorney acting as [her] diligent and conscientious advocate. [Citation.] This means that before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation.

"There are two components to a claim by a defendant that [her] counsel's assistance was so defective as to require reversal of a conviction . . . . 'First, the defendant must show that counsel's performance was deficient.' [Citation.] This requires a showing that 'counsel's representation fell below an objective standard of

reasonableness.' [Citation.] In evaluating a defendant's showing of incompetence, we accord great deference to the tactical decisions of trial counsel. 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'

"The second component requires that the defendant show prejudice resulting from counsel's alleged deficiencies. 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*In re Marquez* (1992) 1 Cal.4th 584, 602-603.)

C. STANDARD OF REVIEW

In reviewing an appeal from the grant of a writ of habeas corpus, the trial court's conclusions of law and its resolution of mixed questions of law and fact are subject to de novo review. Mixed questions include whether counsel's assistance was ineffective and whether the ineffective assistance resulted in prejudice to the defendant. The trial court's findings of fact are reviewed under the substantial evidence standard of review. (*In re Marquez, supra*, 1 Cal.4th at p. 603; *In re Resendiz* (2001) 25 Cal.4th 230, 248-249, abrogated in part on other grounds in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370; *People v. Jones* (2010) 186 Cal.App.4th 216, 235-236; *In re Alcox* (2006) 137 Cal.App.4th 657, 664-665.)

The People contend mixed questions of law and fact are reviewed under the clearly erroneous standard of review. The People cite to *In re Collins* (2001) 86 Cal.App.4th 1176, 1181 (*Collins*) for the standard of review. Defendant contends mixed questions of law and fact that are predominately factual are reviewed under the clearly erroneous standard, while mixed questions that are predominately legal are reviewed under the de novo standard. Defendant does not explain whether the questions in this case are predominately legal or predominately factual. Defendant cites to *Collins* for the standard of review.

Collins, the case to which the parties cite for the standard of review, provides, "This court applies the substantial evidence test to the trial court's resolution of pure questions of fact and independently reviews questions of law, such as the selection of the controlling rule. With respect to mixed questions of law and fact, this court reviews the trial court's application of law to fact under a deferential clearly erroneous standard if the inquiry is predominantly factual. But when the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, this court's review is de novo." (*Collins, supra,* 86 Cal.App.4th at p. 1181.)

Defendant's habeas petition was based upon her federal constitutional right to effective assistance of counsel under the Sixth Amendment. In other words, this case concerns one of defendant's constitutional rights.

Further, the issue of whether defendant received ineffective assistance requires "the exercise of judgment about the values underlying legal principles" (*Collins, supra,*

86 Cal.App.4th at p. 1181), because the court must consider what an objectively reasonable attorney would have done in this case. The court is not focused on the factual inquiry of what Keen did or failed to do. Rather, the court is focused on the constitutional inquiry of what an objectively reasonable attorney would have done. (*In re Reno* (2012) 55 Cal.4th 428, 464-465 (*Reno*).) This inquiry requires the exercise of judgment about what it means to render effective assistance in the context of the facts of this case.

Therefore, because defendant's constitutional rights are implicated and the case requires the exercise of judgment about the values underlying legal principles, the de novo standard is applicable to the mixed questions of law and fact. (See *In re Taylor* (2015) 60 Cal.4th 1019, 1035 [applying the de novo standard to constitutional questions "in light of the factual record made below"]; see also *People v. Louis* (1986) 42 Cal.3d 969, 987 [de novo review is favored when a mixed question involves constitutional rights].)

D. TIME OF DEATH EXPERT

1. *CONTENTION*

The People contend the trial court erred by finding Keen was ineffective for failing to consult a time of death expert and present a time of death defense.

2. *LAW*

We examine whether Keen's representation fell below an objective standard of reasonableness. In this examination, we evaluate the conduct from the circumstances at the time of trial. (*In re Marquez*, *supra*, 1 Cal.4th at pp. 602-603.)

3. *ANALYSIS*

Keen explained that he did not pursue a time of death strategy in building the defense because, in his experience, "anybody who testified regarding time of death would have to give a range, and that the times we were dealing with in [defendant's] case were too small, and then necessarily that range would encompass both theories, the prosecution's theory and our theory." In other words, Keen did not investigate and argue a time of death defense because experts would not be helpful in raising a reasonable doubt concerning the prosecution's theory of the case due to the 40- to 50-minute window of opportunity argued by the People.

At the evidentiary hearing on the order to show cause, Dr. Hua estimated that the victim died "long before 1:20 a.m." Hua explained that his time of death estimation was based upon the deputy coroner making his observations at 5:03 a.m. The record reflects Gomes arrived at the crime scene at 5:03 a.m. and that he recorded the room temperature at 6:11 a.m. A police report reflecting that the people removing the victim's body from the crime scene were at the crime scene from 6:57 a.m. to 7:13 a.m., which indicated Gomes observed the victim's body between 5:03 a.m. and 6:57 a.m.

Dr. Hua explained that if the deputy coroner's observations were made later than 5:03 a.m., then that would affect his time of death estimate. For example, it typically takes eight to 12 hours for fixed lividity to occur. Therefore, he estimated it would take four hours for almost fixed lividity to occur. If Gomes's observation of almost fixed lividity were made at 5:03, then the time of death could be 1:03 a.m.; however, if the observation were made at 6:00 a.m., then the time of death could be 2:00 a.m.

Dr. Hua testified that he could estimate the time of death, but not give a precise time of death. Hua said any time of death estimate he gave would cover a broad range of time. When asked what the earliest and latest possible times of death might be, Hua responded, "That's a slippery ground question. I cannot say that. All I can say is way, way long hours. I'm not talking ten minutes, five minutes earlier than 1:20. I'm talking long, long, before 1:20." When asked if he would give an estimate in numbers, i.e., a timespan denoted by hours and minutes, Hua replied, "I would not."

Dr. Hua's testimony at the hearing on the order to show cause supports Keen's tactical decision to not use a time of death defense because the time of death estimation would be too broad to raise a reasonable doubt as to the prosecution's theory of the case. Hua estimated the victim died before 1:20 a.m., but conceded that estimate was dependent upon observations of the victim's body being made exactly when Gomes arrived at 5:03 a.m.; however, the record fails to show at what time Gomes examined the victim's body. Keen's belief that a time of death expert's estimate would be too broad to raise a reasonable doubt is supported by Hua's testimony that gives an imprecise and shifting time estimate.

When looking at rigidity and lividity, Dr. Bonnell estimated the victim "probably [died] closer to 11:00 than anything else—much closer to 11:00 than 1 o'clock." In regard to the phone call being made from the victim's phone at 11:40, and the victim being heard in his garage at 12:30, Bonnell testified that if that evidence were reliable, then the victim "would have had to die very shortly thereafter."

Dr. Bonnell had not reviewed Juanita's testimony reflecting she heard the victim in his garage at 1:30 a.m. Bonnell did not review defendant's statements reflecting she was a nurse and observed the victim breathing at 2:09 a.m. Bonnell opined that Gomes's report, reflecting rigidity had not started at 5:03 a.m., was incorrect, so he did not rely upon it. Bonnell explained that he relied upon the paramedics' report that lividity and rigor had set in at 2:20 a.m.

Dr. Bonnell gave a fairly restrictive window for the time of death, 11:00 to 12:30; however, that was based upon not considering, or disregarding, all evidence of a later time period, such as Juanita's statement that she heard the victim at 1:30 a.m., defendant's 2:09 a.m. observation that the victim was breathing, Gomes's conclusion that rigor had not started by 5:03 a.m. on October 6, and Dr. Pestaner's observation that the victim's body was in a state of rigor on October 7.

For example, Dr. Bonnell opined that if the victim died close to 11:00 p.m. on October 5, then rigor could have quickly set-in and then quickly passed prior to Gomes's observations on October 6, thereby explaining Gomes's conclusion that the body was not in a state of rigor by 5:03 a.m. on October 6. Bonnell said rigor would not reform once it had passed or been broken. Bonnell's opinion fails to reconcile or explain Dr. Pestaner's observation that the victim's body was in a state of rigor on October 7.

Keen explained that he would be unlikely to rely upon an expert whose opinion did not sound logical and credible. A reasonable lawyer could conclude that an opinion such as Dr. Bonnell's would not be sufficient to raise a reasonable doubt because it

seems to intentionally ignore the evidence that could support a conclusion that the victim's death occurred after 12:30 a.m.

Upon a review of the evidence in the case, in particular, the conflicting rigor information (paramedics observing rigor around 2:20 a.m. on October 6, Gomes observing no rigor between 5:00 and 7:00 a.m. on October 6, and Dr. Pestaner observing rigor on October 7) an attorney could reasonably conclude that an expert's time of death opinion definitively concluding the victim died before 1:20 a.m. would not sound credible to a jury and therefore be insufficient to raise a reasonable doubt. As a result, a reasonable attorney could conclude that relying upon a time of death defense would be inadequate in this case.

Dr. Cohen also testified concerning the time of death. In regard to the narrow time estimate given by Dr. Bonnell, Cohen said, "It's too tight of a—too narrow of a range that is unreliable and inappropriate to put that type of a time frame on it." Cohen said, "How can you have some rigor mortis in the upper extremities at 2:15 or 2:20 in the morning and have no rigor mortis at 5:00 or 6:00 in the morning? It doesn't make sense.

"You know, my—my opinion on this is that the death could have occurred before or after 1:20. I would not pin it down to either before or after 1:20 with any degree of certainty, certainly with respect to what's riding on it here in court today. [¶] So I would—my opinion is that it could have happened before 1:20. It could have happened at 1:45 or 1:30 in the morning. So that's the best I can do. That is the best, in my opinion, that science is able to offer."

Dr. Cohen's testimony also supports Keen's reasoning that an expert's opinion would be too broad to generate reasonable doubt. Cohen explained that his estimate would range from prior to 1:20 to after 1:20, which was Keen's precise concern—"that anybody who testified regarding time of death would have to give a range, and that the times we were dealing with in [defendant's] case were too small, and then necessarily that range would encompass both theories, the prosecution's theory and our theory."

In sum, Keen chose to not pursue a time of death defense based upon his knowledge that times of death are given in ranges and his conclusion that the 49-minute window of time at issue in this case (from 1:20 to 2:09) was too narrow to generate a reasonable doubt. The evidence given by Doctors Hua and Cohen support Keen's assessment that times of death are given in broad ranges. The evidence given by Dr. Bonnell was problematic in that he failed to review or disregarded evidence relating to the post-1:20 timeframe. As a result, an attorney could reasonably conclude that reliance upon expert testimony, such as Bonnell's, would have been a risky defense strategy because a jury could reasonably view such testimony with skepticism and therefore it would be unlikely to raise a reasonable doubt. Keen's decision to not pursue a time of death defense was rational. Keen's representation of defendant did not fall below an objective standard of reasonableness.

4. *TRIAL COURT'S RULING*

a) Procedural History

When the trial court ruled on this issue it said, "Hearing [Dr. Hua's and Dr. Bonnell's] testimony, this Court finds both opinions to be credible, convincing, and

compelling. Their testimony indicates such qualified medical opinions were available at the time of trial and defense counsel failed to seek out medical experts to address the issue. The Court finds that defense counsel's performance fell below an objective standard of reasonableness when he failed to consult and present the testimony of a qualified time-of-death expert.

"In making this ruling, I'm not saying that he should have contacted these two particular experts, but it's apparent to the Court that these qualified opinions did exist in the medical field, and there was no effort to contact or secure the testimony of such experts. [¶] If such experts would have testified, it would have put the victim's time of death at a time when petitioner could not have committed the crime, if believed by the jury. Obviously, it's always a question of fact for the jury to either accept or reject the testimony of any witness that testifies, including an expert."

b) Analysis

The trial court's analysis fails to directly answer the question at issue. The issue is not whether a jury might have believed an expert such as Dr. Hua or Dr. Bonnell. The issue is whether a reasonable attorney would have made the same decision as Keen. In our analysis, we are not examining whether the time of death defense was a good option. Rather, we are examining whether a reasonable attorney could have chosen not to pursue such a defense strategy. (*Reno*, *supra*, 55 Cal.4th at pp. 464-465.)

As explained *ante*, Keen was correct that time of death experts cannot pinpoint a precise time of death and therefore they give timespans for when the death occurred. Given that defendant had been heard arguing with the victim on the night the victim

died, a reasonable defense attorney could choose to focus the jury on another suspect, e.g., Lovejoy. A reasonable defense attorney could look at the case and conclude that even with expert testimony reflecting the victim died at 12:30 a.m., the jury might still believe defendant was the killer because Dills lied or did not accurately recall when he took defendant home, and therefore, the best strategy for raising a reasonable doubt is to focus on another person who was also angry at the victim at the time of the killing and who had an alibi that could be called into question, e.g., Lovejoy.

We disagree with the trial court's conclusion that no reasonable attorney would have failed to present expert time of death evidence to the jury. A reasonable attorney could view the case in the same manner as Keen—given the 49-minute window of opportunity argued by the prosecution and the range of times given by experts, the better defense strategy was to focus on Lovejoy rather than the timing of the death.

5. *DEFENDANT'S CONTENTION*

Defendant argues that because Keen did not consult a qualified time of death expert, his decision not to pursue such a defense was unreasonable and uninformed. Keen explained that he knew times of death are given in ranges from "MCLE training and education for attorneys, homicide seminars, stuff of that nature." As explained *ante*, the evidence supports Keen's conclusion that time of death experts are not able to precisely pinpoint the time of death. Therefore, Keen's decision to not pursue a time of death defense was informed, based upon (1) classes and seminars that explained a time of death expert cannot pinpoint a precise time of death, which is supported by the evidence in this case; and (2) his knowledge that the prosecution would argue defendant

had 49 minutes to complete the killing. Based upon Keen's knowledge, he decided that presenting Lovejoy and Bugarski as possible alternate killers was the best defense strategy. We conclude Keen's decision was informed, and, as explained *ante*, could have been made by a reasonable attorney.

E. CLOTHING

1. *FACTS*

On the morning of October 6, during a police interview, a female officer took defendant's clothes from her for evidentiary purposes. No blood was found on defendant's clothes. Defendant's clothing included (1) a sleeveless T-shirt, with small silver metallic rings along the seams and a design that included a skull, flames, playing cards, and the words "punk lives!"; (2) jeans; and (3) a black belt with silver metallic studs. In a police interview of Dills, the following exchange took place:

"[Unidentified Officer]: What, what was she wearing?

"[Dills]: She was wearing, um, a black tee shirt that had some designs on [*sic*], I'm thinking biker, rock and roll stuff or something. What I remember was like little rings, chain, like a chain. It looked like a chain that was like part of the shirt.

"[Unidentified Officer]: Okay.

"[Dills]: And she had a purse that had little rings that matched that. And she was wearing blue jeans, kinda low rider blue jeans and um, I think she had a black belt on."

At the retrial, the prosecutor presented defendant's testimony from her first trial. In that testimony defendant recalled that on October 5 she wore "jeans and a studded

belt to match [her] shoes and a black shirt with a design on it. But it had little ringlets that matched [her] necklace."

During the prosecutor's closing argument at the retrial he said, "The blood evidence. [¶] Well, yeah, there's no blood on her. [¶] Officer Welde told you there's no blood, because, hey, she's not going to let her hug her and climb all over her in her street—personal clothes if she's got blood on her.[5] [¶] Who can tell us that those were the clothes that she was wearing that day? You didn't hear any evidence other than from her. You've got to rely upon her again that those were the clothes that she was wearing that day. [¶] And isn't it interesting to you, ladies and gentlemen, that this nurse who works in an emergency room, who renders medical aid on a daily basis doesn't have any blood on her? Any blood on her. Not a smudge. Not a trace of blood.

"Not only does she not have blood on her, but every item of clothing that she strewn—throws, how's that. Every item of clothing that she throws about the house, that doesn't have blood on it either. With all the blood in that scene, she is somehow miraculously lucky enough not to put anything down in her hurried state in an area where there would be blood."

During Keen's closing argument, he said, "Now, Mr. Verdugo. He's the evidence guy. And he draws this diagram labeled Defense A. [¶] On this diagram he pinpoints everywhere he found blood. He found blood on every wall in the living room.

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5 When waiting at the police station early on October 6, Officer Welde hugged defendant and defendant rested her head on Welde's lap, while Welde was wearing street clothes.

He found blood on the door—the front door, the blinds. That table had a fine mist of blood all over it. He found blood over on the wall where the fireplace is. Found blood on the window. The blinds there. On the TV, which is in that entertainment center. He found blood over that little table that had some pictures on it. Blood above that. And then he found blood on the wall behind [the victim]. What he didn't find blood on was any of [defendant's] clothes. Not on her shoes that are right behind [the victim]. Not on her helmet, which is right next to blood spatter. Not on those funny little [novelty] hats. And not on her jacket that she said she was wearing. There was no blood on it.

"If the theory is it was there when it happened, blood went over that way, but there's no blood on her jacket. If their theory is, well, she had it on, then no blood got on her. No blood on her hair, her face. She hasn't cleaned herself. Officer Welde doesn't smell any fresh shampoo, doesn't smell any cleaner on her. Her clothes aren't fresh and laundered. You didn't hear any evidence about a shower having been wet or moist or sinks had been used or water or anything like that. There's no blood on her jacket. There's no blood on her. But there is blood all over the room. [¶] This isn't a gruesome scene, like somebody dumped a bucket of blood. There's blood spatter all over, but not on her."

Keen did not seek to have Dill's statement about defendant's clothes admitted into evidence at defendant's trial because he "didn't think there was any way [he] could have gotten that in." Keen also believed defendant's testimony regarding not having changed her clothes and Officer Welde's testimony about not recalling any signs of washing or cleaning on defendant was sufficient to prove the clothing issue. Michelle

Rogers was defendant's appellate attorney for her direct appeal. Rogers said there was not "legal authority directly allowing the admission of hearsay," referring to Dills's statement about defendant's clothing.

Dills's preliminary hearing testimony was read at trial due to Dills dying prior to trial. Dills died in a motorcycle accident. At the preliminary hearing, Keen did not question Dills about defendant's clothes. Keen believed he had a copy of Dills's police interview prior to the preliminary hearing. The following exchange took place during Keen's testimony at the hearing on the order to show cause:

"The Court: Right now we're talking about questioning at the preliminary hearing. [¶] Did you think that [the clothing] was a critical issue at the time of the preliminary hearing?

"[Keen]: No.

"[Defendant's Counsel]: Why not?

"[Keen]: It was a preliminary hearing. I didn't—I didn't ask those questions at [the] preliminary hearing. I don't know why not. I should have."

When ruling on defendant's motion for new trial, the trial court said, "The cross-examination of Mr. Dills during the preliminary hearing was, as in most preliminary hearings, not extensive. [¶] The burden of proof for the magistrate at the preliminary hearing is a strong suspicion, and that is the burden that was applied. And pursuant to that burden, the defendant was held to answer. [¶] And, oftentimes, the examination by a defense attorney, and I'm not faulting anyone in this case, the examination of a defense attorney is toward that burden of proof."

2. *ANALYSIS*

a) Preliminary Hearing

We examine whether Keen was ineffective at the preliminary hearing for not questioning Dills about defendant's clothing.

"The purpose of a preliminary hearing is to determine whether a defendant charged with a felony by criminal complaint should be held for trial." (*People v. Esmaili* (2013) 213 Cal.App.4th 1449, 1459.) The prosecution's burden of proof at a preliminary hearing is " ' "reasonable and probable cause," that is, such a state of facts as would lead a [person] of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.' " (*Id.* at pp. 1459-1460.) A preliminary hearing is not a trial. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 251.) "[T]he magistrate's role is limited to determining whether a *reasonable person* could harbor a strong suspicion of the defendant's guilt." (*Id.* at pp. 251-252.)

Because a preliminary hearing is not a trial, "the cross-examination of a witness at a defendant's preliminary hearing is seldom adequate. The cross-examiner does not have the same motivation to cross-examine a witness at a preliminary hearing when the prosecution's only burden is to establish probable cause, as he later has at the defendant's trial when the People must prove the defendant guilty beyond a reasonable doubt. Thus, the cross-examination is seldom a searching exploration into the witness'[s] motives or other facets of his testimony to test his credibility. In fact, experienced trial lawyers often defer cross-examination entirely until the time of trial

when it is most effective." (*People v. Vinson* (1969) 268 Cal.App.2d 672, 676, fn. omitted.)

When Dills was testifying at the preliminary hearing, the following exchange took place:

"[Prosecutor]: When you got to your house, what, if anything occurred there?

"[Dills]: We had a drink, and we got in my spa.

"Mr. Keen: I'll object. Relevance at this point.

"The Court: The answer stands. He can answer what happened.

"[Prosecutor]: You say you got in your spa. Did the defendant have a swimsuit with her?

"[Dills]: No.

"Mr. Keen: Objection. Relevance.

"The Court: [Prosecutor], relevance?

"[Prosecutor]: Certainly, Your Honor. I believe the witness will testify that the defendant entered the spa wearing a pair of panties, that when the defendant left his residence, the defendant wasn't wearing the panties. She was holding them with her. When the defendant was taken to the police station later that evening, she is wearing an outfit which is similar in description to the outfit that she was wearing when she left Mr. Dills' residence, but she has panties on. The implication there is obviously that at some point in time she had to change which might explain the absence of blood on her clothing. So therefore I feel it is relevant.

"The Court: You can answer it."[6]

At the preliminary hearing, the prosecutor conceded that "[w]hen the defendant was taken to the police station later that evening, she is wearing an outfit which is similar in description to the outfit that she was wearing when she left Mr. Dills' residence." The prosecutor explained that the difference in clothing was that defendant was wearing panties when police arrived, but not when she left Dills's house. Given the prosecution's theory of the evidence—that defendant's clothes matched the description given by Dills, Keen had no reason to question Dills about defendant's clothes. In other words, if Keen questioned Dills about the clothing, Keen would hope for the answer already given by the prosecutor—that the clothing described by Dills was such a close match to the clothes seized by police that defendant's panties were the only item that could prove a change of clothes occurred. Thus, a reasonable attorney would not have questioned Dills about defendant's clothing.

Further, a preliminary hearing is not a trial and Dills died in a motorcycle accident, i.e., unexpectedly. Given that it was not a trial and Keen had no reason to expect Dills would die before trial, it was reasonable that Keen did not question Dills about every detail of the case. In sum, it was reasonable that Keen did not question Dills about defendant's October 5 clothing because (1) the prosecutor did not dispute that defendant's October 6 clothing was so similar to the clothing Dills described defendant wearing on October 5 that her wearing of panties would have to prove that

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[6] The prosecutor's explanation as to why the evidence was relevant was redacted from the transcript that was read to the jury.

she changed clothes; (2) a preliminary hearing is not a trial; and (3) Keen had no reason to expect Dills would die prior to trial. Accordingly, in regard to Keen failing to cross-examine Dills about defendant's clothing, we conclude Keen's performance was objectively reasonable.

b) Trial

We examine whether Keen rendered ineffective assistance by failing to move the trial court to admit Dills's description of defendant's clothing.

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) In assessing an ineffective assistance of counsel claim, "the question is not what the 'best lawyers would have done,' nor 'even what most good lawyers would have done,' but simply whether 'some reasonable lawyer' could have acted, in the circumstances, as defense counsel acted in the case at bar." (*People v. Jones*, *supra*, 186 Cal.App.4th at p. 235.)

Dills described defendant's clothing during a police interview. Thus, Dills's description of defendant's clothing is an out-of-court statement. Defendant would be offering Dills's statement to prove what she wore on October 5. Thus, the statement would be offered for its truth. Because the statement was made outside of court and would be offered for its truth, the statement is hearsay. Rogers, defendant's attorney on direct appeal, testified that there is no direct legal authority for admitting the hearsay that is Dills's statement. The prosecution did not provide evidence, such as security

footage or witnesses from the Maverick, reflecting defendant was wearing different clothing on October 5.

Given that (1) Dills's statement constituted hearsay and there is no direct legal authority for admitting that hearsay; and (2) there was no direct evidence offered by the prosecution that defendant was wearing different clothes on October 5, a reasonable attorney could have decided not to seek admission of the hearsay statement. Thus, Keen's decision to not seek to have that hearsay admitted fell within an objective standard of reasonableness. Keen did not render ineffective assistance.

c) Ruling

i. *Procedural History*

When the trial court ruled on the clothing issue, it said, "The evidence presented to the jury demonstrated it was an extremely bloody crime scene.[7] There is no question the perpetrator would have the victim's blood on her person. Although the People have now argued in this hearing that it is possible for a perpetrator to not have blood on her clothes, this Court finds this theory unlikely and not consistent with the crime scene as described by Daniel Verdugo in his trial testimony."

The court continued, "In both trials, the People argued that [defendant] was a liar and gave three specific examples: Her clothing, her shoes, and her purse. People argued [defendant] killed [the victim] and changed her clothes before the paramedics arrived, including the police.

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[7] Photographs of the crime scene show drops of blood scattered around the room.

"[Defendant] testified at trial, the first and second trial, that she didn't change her clothes, but defense counsel failed to present any corroboration of those self-serving statements regarding her clothes or her purse or her shoes. And this was true in the first trial as well, the first trial being, basically, the same theory in the second trial, that the defendant had an opportunity to change her clothes because the perpetrator of this homicide undoubtedly would have had blood on their person or on their clothes.

"[Defendant] testified that she didn't change her clothes, which gave the prosecution the opportunity in closing argument to argue that she's a liar, don't believe her, there's no corroboration of that. The only evidence that she didn't change her clothes is, obviously, her testimony, which you can't believe.

"At this hearing, [defendant] has presented evidence that her clothes she wore the night of the murder matched the clothes collected by the police after the murder. Specifically, witness Jeffrey Dills had provided a description of [defendant's] clothes to the police. The parties admitted the police interview of Mr. Dills as evidence in this case. Dills' description of the clothes matched the exact description of the clothes taken from the petitioner after the murder. [¶] Dills was never questioned by defense counsel at the preliminary hearing about what clothes [defendant] was wearing while he was with her the night of the murder.

"Further, after Mr. Dills' untimely death, defense counsel did not seek to introduce Dills' description of the clothes at [defendant's] trial, and as far as Mr. Dills' description of what [defendant] was wearing while she was in his company that evening, it was not a generic description of clothing that we often hear—for example,

light-colored shirt or bright-colored pants. This was a very specific description of very unique and distinctive clothing, and of course this was in his interview with police, which was tape-recorded and video-recorded. And at the preliminary hearing, Mr. Dills basically testified concerning what time he dropped off [defendant] the night of the murder, was not questioned at all about the clothing description, and because Mr. Dills was killed in a traffic accident prior to trial, the preliminary hearing transcript only was admitted. So the testimony of Mr. Dills that the jury heard basically dealt with [defendant], what they did that evening, and dropping her off at her home between 1:20 and 1:30 without ever any mention of what clothing she was wearing.

"Defense counsel admitted that he failed to ask Dills about [defendant's] clothes at the preliminary hearing and failed to ask of this Court during the first trial and second trial to admit Dills' statements to the police regarding what clothing [defendant] was wearing prior to the murder. Defense counsel admitted that he had no tactical reason for not doing so.

"The Court finds the issue of whether [defendant] changed her clothes is a significant issue in this case. If [defendant] did not change her clothes, there's a reasonable inference from the evidence that she is not the killer. Hence, it was pivotal that defense counsel establish that [defendant] did not change her clothes. Accordingly, this Court finds defense counsel's performance fell below an objective standard of reasonableness when he failed to prove [defendant] did not change her clothes."

ii. *Analysis*

The trial court concluded that the clothing issue was significant. However, the trial court fails to explain how the issue is significant, when the prosecution presented no evidence on the issue, e.g., no testimony from Tabitha or security footage from the Maverick regarding defendant's clothes. Nevertheless, assuming the clothing issue is significant, the trial court fails to explain why it is unreasonable for an attorney to decide not to seek admittance of hearsay. The evidence reflects there was no direct legal authority for admitting Dills's out-of-court statement. It is objectively reasonable for an attorney not to move the trial court to admit hearsay evidence for which there is no exception for admissibility. Accordingly, we disagree with the trial court's analysis.

d) Advisory Ruling

i. *Procedural History*

After concluding Keen was ineffective for failing to seek admittance of Dills's out-of-court statement, the trial court said, "Now, a side note, which is not necessary for my ruling today, but at some point an issue may come up of whether or not Mr. Dills' tape-recorded or video-recorded statement would be admissible in a subsequent trial, and I think we all acknowledge that there's no specific exception in the California Evidence Code which would allow the tape-recorded statement to come in as a hearsay exception under the California Evidence Code.

"However, in giving this case much thought, it occurs to this Court that there were two possible grounds for admissibility. Again, this is not necessary for my ruling today, but I think the record should be clear as far as my thoughts and what I would

have done during the second trial if the defense attorney would have requested me to entertain admitting the tape-recorded, slash, video recording of Mr. Dills—in particular, the description of [defendant's] clothing.

"The Court could easily conclude that the clothing description of Mr. Dills given in the recorded statement is not hearsay. The analysis would be as follows:

"It would be introduced as circumstantial evidence of his knowledge regarding a very specific, distinctive, and unique clothing and purse worn by the petitioner. [¶] His actual testimony read to the jury: She obviously was with him that evening prior to the murder and was dropped off at her home. When contacted by the police—and this is actual evidence. When contacted by the police, she was wearing the identical clothing described by Mr. Dills. This leads to the only reasonable inference circumstantially that she didn't change clothes after the murder as argued by the prosecution.

"So I think clearly this could be introduced to show Mr. Dills' specific knowledge of clothing through a hearsay introduction, which would lead to a circumstantial inference of the fact that she was wearing the same clothing when contacted by the police. The inference would be she didn't change her clothes. Nonhearsay.

"On another note, if we're talking about a possible hearsay exception, possibly for the entire record or video recording, we can look to the Supreme Court—United States Supreme Court starting off with *Chambers vs. Mississippi* [(1973) 410 U.S. 284] where the court found that reliable hearsay statements made under certain circumstances can be admitted, despite state law, as a matter of due process. And that was one of the

things I always—many years ago at the sentencing on due process violation in this case—I should say I made that statement during [the] DNA request for testing when the Court was made aware of the actual clothing description.

"Anyway, there is case law which the trial court could rely upon in this particular case for its decision—unusual case—and the issue of clothing being highly relevant to a crucial issue. And under the circumstances, Mr. Dills gave a statement with substantial reasons to assume its reliability because the prosecution's entire case was based upon the statement of Mr. Dills saying that he had dropped her off between 1:20 and 1:30. But for that evidence introduced by the People, relied upon by the People—but for that evidence, the Court would have dismissed this case under 1118.1. So obviously the People's cornerstone to their prosecution was the reliability of Mr. Dills.

"Then, of course, we have Federal Rule 807, which is an exception to the hearsay rule, which is kind of an outgrowth from *Chambers v. Mississippi*. But at any rate, there is grounds for a hearsay exception to apply outside the California Evidence Code, and that would apply probably to most of the recorded statement. So with that said, the Court had found defense counsel's performance deficient on an objective standard of reasonableness."

ii. *Analysis*

Although the trial court said its advisory ruling had no impact on its finding that Keen's performance was deficient, for the sake of thoroughness, we will address the trial court's advisory ruling. The trial court gave three bases for the admissibility of Dills's statement: (1) the statement was not hearsay because it was circumstantial

evidence of Dills's knowledge; (2) the statement was reliable hearsay under *Chambers v. Mississippi*; and (3) the statement satisfied a federal hearsay exception, in particular Federal Rules of Evidence rule 807. We address each basis in turn.

aa) ***Non-hearsay***

The trial court concluded Dills's statement was not hearsay because the statement was circumstantial evidence of Dills's knowledge of defendant's clothing.

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.)

Dills's description of defendant's clothes was made during a police interview, which was outside of court. Dills died prior to trial, so he was not a witness at trial. Defendant would offer the evidence to prove that on October 5 she was wearing the clothes described by Dills. Thus, defendant would be offering Dills's statement for its truth. As a result, Dills's statement is hearsay.

The trial court's conclusion that the statement is circumstantial evidence of Dills's knowledge fails to explain how the statement is not hearsay.

Given that the trial court's reasoning fails to explain why Dills's statement does not constitute hearsay, we conclude Keen was not ineffective for failing to raise such an argument. A reasonable attorney could see (1) that the statement was hearsay, and (2) that the prosecution presented no evidence to contradict defendant's testimony that she did not change her clothes, and therefore not move the court to admit the inadmissible hearsay evidence.

bb) ***Chambers v. Mississippi***

In *Chambers v. Mississippi*, *supra*, 410 U.S. 284, the defendant, Leon Chambers, asserted that application of Mississippi's rules of evidence rendered his murder trial fundamentally unfair and deprived him of due process. (*Id.* at pp. 289-290.) The victim in the case was Woodville Police Officer Liberty. (*Id.* at pp. 285-286.) Prior to trial, Gable McDonald went to an attorney's office and gave a sworn confession that he shot Officer Liberty. McDonald was arrested. (*Id.* at pp. 287-288.) At the preliminary hearing, McDonald repudiated his confession, asserted he was innocent, and claimed he had been persuaded into confessing by a promise of money. (*Id.* at p. 288.)

At his trial, Chambers requested the court order McDonald to appear and that he be permitted to call McDonald as an adverse witness. The trial court ordered McDonald to appear, but denied Chambers's motion to examine McDonald as an adverse witness because McDonald did not accuse Chambers of murder. As a result, Chambers was able to question McDonald, but could not directly challenge McDonald's renunciation of his prior confession. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 291-292.)

Chambers then sought to introduce the testimony of three witnesses who heard McDonald admit that he shot the officer. The State objected on the ground of hearsay. The trial court sustained the State's objection. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 292-293, 298.) Mississippi had a hearsay exception for statements made against one's pecuniary interest, but not for statements made against one's penal interest. (*Id.* at p. 299.)

The United States Supreme Court explained that hearsay is generally excluded because out-of-court statements "lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury." (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 298.) However, exceptions have developed over the years, that permit "admission of . . . hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination." (*Id.* at pp. 298-299.)

The Supreme Court found that McDonald's admissions were made under circumstances that indicated reliability: (1) they were made spontaneously to close acquaintances shortly after the murder; (2) there was other evidence corroborating the hearsay, such as McDonald's sworn confession; and (3) the hearsay was self-incriminating, i.e., against McDonald's penal interest. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 300-301.) The Supreme Court noted that few rights are more fundamental than the right to present witnesses in one's own defense. The court then found the hearsay evidence was critical to Chambers's defense. The court concluded, "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Id.* at p. 303.)

Dills's description of defendant's clothing was not made under circumstances that indicate trustworthiness. Dills's statement was not made spontaneously; rather, it

was made in response to an unidentified police officer asking Dills, "What, what was she wearing?" Dills was being interviewed a second time because the officers wanted to "clear up some things." The hearsay was in Dills's penal interest because defendant provided Dills an alibi. Dills's version of events explained why he should not be a suspect—he was with defendant at his house, and never entered defendant's house after being at the Maverick. If Dills told the officer that defendant had been wearing a dress on October 5, i.e., her clothes did not match, then officers might look at how the dress was disposed of. Officers might look to whether Dills was involved in the crime, either by being present during the killing or aiding in the disposal of the clothes and weapon(s). By telling the officer that defendant's October 6 clothes matched her October 5 clothes, the police might instead focus on forensic testing of the October 6 clothes, thus freeing Dills from any implication in the crime.

In sum, a reasonable attorney could choose to not make a *Chambers v. Mississippi* hearsay exception argument concerning Dills's statement because Dills's statement was not made under particularly reliable circumstances. A reasonable attorney could view the evidence as being inadmissible under California law and not meeting the *Chambers v. Mississippi* exception, and therefore elect to not raise the issue with the trial court.

cc) ***Federal Rules of Evidence***

Federal Rules of Evidence, rule 807(a) provides, "Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice."

The state trial court, where defendant was tried, is bound by the California Evidence Code, not the Federal Rules of Evidence. (*People v. Chatman* (2006) 38 Cal.4th 344, 381, fn. 15; *Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893, 897, fn. 4.) A reasonable attorney could choose not to argue an evidentiary motion in state court that is based upon the Federal Rules of Evidence because the state court is not bound by such rules, and the evidence is inadmissible under the state laws by which the court is bound. Accordingly, to the extent one may look to the trial court's advisory ruling as providing a reason for Keen's performance being deficient, we find such reasoning to be unpersuasive because a reasonable attorney could choose not to argue a motion based upon Federal Rules of Evidence rule 807 in state court.

e) *Defendant's Argument*

i. *Dills's Reliability*

Defendant contends that because the prosecution relied upon Dills's preliminary hearing testimony in proving its case, the prosecution would not have been able to reasonably argue that Dills's police interview lacked credibility. We infer defendant is asserting an objectively reasonable attorney would have presented a *Chambers v.*

Mississippi hearsay exception argument because the prosecution could not reasonably argue that the circumstances of Dills's police interview failed to indicate reliability when the prosecution relied upon Dills's preliminary hearing testimony in proving its case.[8]

As set forth *ante*, we are not looking at what the best defense attorneys would have done, rather, we are examining whether an objectively reasonable attorney during motions in limine would have presented a *Chambers v. Mississippi* motion. (*People v. Jones*, *supra*, 186 Cal.App.4th at p. 235.) An objectively reasonable attorney could determine that Dills's statement did not fall within any state hearsay exceptions and then determine that the circumstances of Dills's police interview did not indicate reliability, as discussed *ante*.

It would be a particularly skillful attorney that would argue beyond the factors of *Chambers v. Mississippi*. The attorney would need to argue that, despite the circumstances of Dills's interview not being particularly reliable, because the prosecution is utilizing Dills's preliminary hearing testimony (which was given in court, under oath, and subject to cross-examination) his police interview should be admissible. Such an argument goes beyond *Chambers v. Mississippi*, which focuses on the circumstances of the statement; to argue the use of other statements/testimony by the

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[8] We make this inference for the sake of addressing defendant's contention. In making this inference, we ignore defendant's contradictory assertion that Dills was a suspect in the case with a motive to lie. In particular, defendant's respondent's brief provides, "Dills was not subjected to meaningful cross-examination with full discovery, and there were numerous questions left open concerning Dills' level of intoxication and possible motivation to lie, i.e., he was a suspect in the murder."

same witness makes all statements by that witness, including hearsay, admissible. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 298-301.) Defendant's argument places too great an expectation on the shoulders of a reasonable attorney. A reasonable attorney can be expected to make arguments that are within the law, but we do not expect a reasonable attorney to necessarily advance the law; again, we are looking at reasonable attorneys, not the best attorneys. Accordingly, we find defendant's argument to be unpersuasive.

3. *LACK OF TACTICAL REASONS*

Defendant contends Keen was ineffective because Keen testified that he had no tactical reason for failing to (1) question Dills at the preliminary hearing concerning defendant's clothing; and (2) move the trial court to admit Dills's statement about defendant's clothing.

In *Reno*, our Supreme Court discussed the issue of whether Thomas Nolan, the defendant's attorney for his appeal and first habeas petition, was ineffective for failing to raise claims that had later been identified by the defendant's second habeas counsel. (*Reno*, *supra*, 55 Cal.4th at pp. 462-463.) The Supreme Court wrote, "Nolan's asserted lack of a tactical reason for omitting certain claims does not necessarily establish that he was ineffective for failing to raise them on appeal or in the first habeas corpus petition. Unless counsel's failure to raise the issue earlier was objectively unreasonable and the omission caused the petitioner actual prejudice, counsel's omission of the claim does not" rise to the level of ineffective assistance. (*Id.* at pp. 464-465.) The high court concluded, "In short, the omission of a claim, whether tactical or inadvertent, does not

of itself demonstrate ineffectiveness unless it was objectively unreasonable, meaning that the omitted claim was one that any reasonably competent counsel would have brought." (*Id.* at p. 465.)

Defendant is correct that Keen said he had no tactical reason at the preliminary hearing for failing to question Dills about defendant's clothing, and for failing to move the trial court to admit Dills's interview statement about defendant's clothing. However, Keen also testified that he did not question Dills about the clothing because "[i]t was a preliminary hearing," and did not make an evidentiary motion because he thought there was sufficient evidence on the topic given defendant's testimony and Officer Welde's testimony.

There was also evidence that Keen did not make a motion because he thought the evidence was inadmissible. Keen explained that the defense strategy was to "tell[defendant's] story" via her testimony and to present Lovejoy and Bugarski as alternate suspects. We understand Keen's testimony as explaining his strategy did not involve the tactic of actively excluding Dills's observations of defendant's clothing, but for the strategy Keen did employ, evidence of Dills's observations about defendant's clothes were unnecessary.

Defendant's reliance on Keen's testimony that he did not have a tactical reason for (1) not questioning Dills about the clothing at the preliminary hearing, and (2) not moving the court to admit Dills's statement is not sufficient to conclude that Keen was ineffective. Defendant must also explain why Keen's actions were objectively unreasonable—why no reasonably competent attorney could have failed to question

Dills or failed to move the trial court to admit Dills's statement. (*Reno, supra,* 55 Cal.4th at p. 465.) Because (1) defendant does not explain why no reasonably competent attorney could have acted in the same manner as Keen, and (2) we have concluded *ante* that a reasonably competent attorney could have made the same decisions as Keen, we find defendant's argument to be unpersuasive.

F. PREJUDICE

We do not address the second prong of the ineffective assistance of counsel analysis, which is prejudice, because we have concluded Keen provided effective assistance, in that his performance did not fall below an objective standard of reasonableness. (*In re Richardson* (2011) 196 Cal.App.4th 647, 662.)

DISPOSITION

The order is reversed. The matter is remanded to the trial court to address the issue of custody because defendant was granted bail pending the outcome of this appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.